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Tasini v. New York Times

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Libraries Continue to Take on from page 28

ALA, ARL, AALL, and MLA view the CD-ROM of the *National Geographic* magazine as no different than if a microfilm version of the magazine had been made. Copyright protection extends to works in any tangible medium of expression. The original collective works that are reproduced in digital facsimiles constitute a permissible revision and are not themselves changed by the transformation from paper to the CD-ROM version. In this case, the photographs at issue appear in the CD-ROM version in the exact positions (along with text and advertising) in which they appeared in the original print version of the magazine.

Libraries support the right of scholars and researchers to combine pre-existing works with the necessary software to provide a searching capability. Under the Eleventh Circuit's decision, CD-ROMs or digital technologies that require the addition of such software could arguably not qualify as a permissible revision. Unfortunately, the Court declined to hear the case.

The library associations will continue to participate in copyright and intellectual property debates in multiple venues to ensure that library interests are represented and importantly, to promote balanced intellectual property regimes that support research and education as well as the interests of the owners of intellectual property. 

Tasini v. New York Times

by Ward Shaw <wshaw@carl.org>

Effects and Predictions

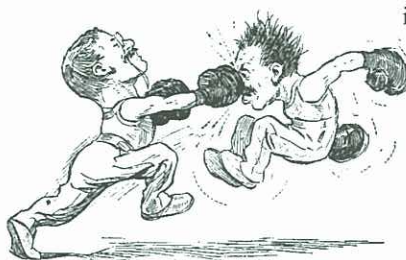
Predicting the future is a dangerous undertaking. There are too many ways to go wrong, and only one to go right. Predictions can be wrong in substance, timing, effect, attribution, and any number of other ways, and people who believe otherwise from the predictor will always be available in numbers to point them out. I do not believe I have ever been right in past predictions, so the reader should keep that in mind. It is particularly difficult to look forward in an area as confused as copyright, publishing, information technology, law, economics, and human

behavior. But, those are the subjects directly affected by the Supreme Court's decision in *Tasini v. NYT*.

The decision, when taken together with several other cases recently tried, settled, or still in progress, suggests that the courts are generally sympathetic with the rights of authors when they conflict with those of publishers, and also and more problematically, when they conflict with the rights and desires of readers. This derives, properly, from the careful reading and interpretation of the various copyright laws, and is probably reasonable given those laws. One thing that is very clear is that we amateurs (authors, readers, publishers, librarians, etc.) are not competent to say what copyright is or does, and do so at our peril. During the early *Ryan v. Carl* hearings, a Federal Judge told me emphatically "You don't know what copyright is until I tell you what it is!" – and believe me, in the formal and powerful atmosphere of a Federal Court, I got the message.

There are some things we can observe with certainty, because they are already

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happening. First, publishers and authors all across the spectrum are tightening up and clarifying their relationships and contracts, so that what is transferred, and what is expected in return, are much more directly and carefully specified. Because this is a buyer's market with regard to publishers and authors, this specificity is probably not, on balance, in favor of authors.

Second, some information is being withdrawn from online databases, much to the public consternation of Mr. Tasini, who claims that such draconian action is unnecessary. This leaves readers in the unfortunate position of having to turn to microfilm archives to retrieve articles they may have no convenient way of discovering in the first place, a course of action incredibly advocated by none other than the **American Library Association** in arguing their astonishing brief in support of Tasini.

These things are happening now, and will continue as the impact and meaning of Tasini and other cases gradually becomes clear. Other effects, which I expect will also occur, are in the realm of prediction.

Among these –

1 There will be fewer documents available “by the drink” from document suppliers. Articles published since the 1976 Act are at risk, absent explicit transfer of rights to reproduce from authors to publishers. In fact, all of the existing docu-

ment suppliers are probably operating illegally – see the direction *Ryan v. Carl* was taking before the settlement. Efforts by such groups as Tasini's own National Writers Union, the Authors Guild, and even the Copyright Clearance Center to establish easily accessible electronic rights clearing supporting authors have either failed or not developed anything like critical mass.

2 There will be a number of cases against existing document suppliers and third party database producers and operators filed as class actions by entrepreneurial lawyers, and some of them will be successful, further tilting the environment against readers.

3 Sooner, rather than later, I expect that there will be a case against an academic institution, or a group of them, directed toward interlibrary loan of copies of articles, and I expect such a case to be successful. After all, the volume of commercial document supply is small relative to the volume of interlibrary lending, and this must come under scrutiny.

4 There will have to be a substantial new effort to invent comprehensive legislation to govern intellectual property. There are many stakeholders and many issues, and the laws as they exist are clearly misunderstood, confused, ineffective, lopsided, and sometimes downright silly in their effects. I have no great expectation, though, that we'll get it right anytime soon. Accordingly, we'll continue to operate in a very difficult environment.

These are general predictions, and although probably wrong, are pretty obvious. It is important to remember, in thinking about all of this, that there are many different kinds of publishing and writing, and many different kinds of reading. Scholarly publishing is very unlike newspaper publishing, for example, just as research is very unlike the reading of popular mystery novels. Those differences will lead to different paths of evolution.

All, however, will be affected by the current environment, which clearly slants toward the property rights of authors. I find it difficult to see how readers are being helped by any of this, and I hope (rather than predict) that somehow these interests will be served as we create new worlds.

It is instructive to actually read the Supreme Court opinion, and the dissent. Go to <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=00-201>, for example, and read the whole thing for yourself – it will only take 15 minutes, and will do more toward understanding of the case than any mountain of commentary. I was particularly struck by **Justice Stevens'** closing comment in his dissent. He wrote: “The majority is correct that we cannot know in advance the effects of today's decision on the comprehensiveness of electronic databases. We can be fairly certain, however, that it will provide little, if any, benefit to either authors or readers.”

I agree. 🐼

corporate response

Response Received from LexisNexis Corporate Counsel

As you know, because of the *Tasini* decision, some older articles on the LexisNexis database and other online services will no longer be available. However, for the past several years, publishers have been obtaining broader rights from freelancers that allow freelance articles to be reproduced in the LexisNexis database and other online services. In fact, LexisNexis has agreements with all its content providers to obtain the appropriate rights and licenses to freelance articles.

LexisNexis prides itself on providing customers with the most thorough coverage possible to guide key decisions. Anything that compromises this mission, regardless

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Again, I apologize for not being able to provide more detailed responses at this time to your questions on fair use or case specifics. 🐼